



BEST AVAILABLE COPY

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of
Ronald O. Bubar

) Examiner: Tran Lien, T.

) Art Unit: 1761

)

Serial No.: 09/535,067

) Atty. Docket No. 45768.2001.3

)

Filed: March 23, 2000

)

)

For: LAMINATED PIZZA CRUST

)

To: Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF (37 C.F.R § 1.192)

This is an appeal of the Examiner's final rejection of claims 12, 13, 16-23 and 25-28, issued on July 21, 2004. This brief is transmitted in triplicate.

REAL PARTY IN INTEREST.

This application has been assigned to Jeno F. Paulucci.

RELATED APPEALS AND INTERFERENCES.

There are no other appeals or interferences related to this appeal. Accordingly, this section is inapplicable.

STATUS OF CLAIMS.

Claims 12, 13, 16-23 and 25-28 are pending in the case and have been finally rejected. A

copy of the appealed claims is attached as a Claims Appendix. Claims 8-11 have been withdrawn from consideration, and claims 1-7, 14, and 24 have been cancelled without prejudice. Note that claim 15 is presently pending and not withdrawn, but has not been indicated allowable or rejected by the Examiner. However, claim 15 is included in the claims listed in the Claims Appendix.

STATUS OF AMENDMENTS.

Since the Examiner issued the final rejection, Applicant filed its Notice of Appeal on October 21, 2004, without further amendment.

SUMMARY OF CLAIMED SUBJECT MATTER.

The claimed subject matter includes a laminated crust suitable for use as a pizza crust. (See Specification page 3, line 5). Generally, consumers desire a pizza crust having crispy characteristics. (See Specification page 1, line 18). However, providing a crispy crust for pizza that is frozen and must be reheated, such as with microwave energy, has traditionally not been attainable. (See Specification page 1, line 18). The laminated crust of the claimed subject matter improves these qualities compared to the prior art. (See Specification page 3, line 5).

In the claims at issue, the crust comprises a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough. (See Claims Appendix, independent claims 12, 17, and 27). Independent claim twelve includes a laminated crust dough comprising a multi-layered dough lamination incorporating a plurality of margarine layers distributed between layers of a proofed dough product. The lamination may be formed by

forming the dough product into a sheet, extruding a margarine layer thereon, manipulating the sheet and margarine to produce a folded dough having a plurality of margarine layers distributed between layers of the dough product, and docking the folded dough to form a laminated crust dough having a plurality of puncture openings. (See Specification page 4, line 36 through page 5, line 7, and Figure 1, reference characters 12-15).

Independent claim seventeen includes a laminated crust dough pizza comprising a plurality of layers including margarine distributed between layers of dough. The plurality of layers of margarine distributed between layers of dough may be formed by proofing a dough sheet, extruding a margarine layer onto the dough sheet, folding the sheet over the margarine layer to form a fatted dough, stretching the fatted dough into a fatted sheet using a first stretching means including a series of rollers applied to the fatted dough, distributing the fatted sheet onto a conveyor using a first piling means to overlap the fatted sheet on the conveyor, and reforming the fatted sheet to a predetermined thickness. (See Specification page 4, line 36 through page 5, line 7, page 7, lines 3-14, Figure 1, reference characters 12-15, and Figure 3). The folding, stretching, distributing and reforming steps produce a folded dough having a plurality of margarine layers distributed between layers of dough. The folded dough may be docked to form a laminated crust dough and one or more pizza toppings may be applied to the laminated crust dough. (See Specification page 5, lines 4-7).

Independent claim twenty-seven includes a laminated crust comprising a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough. (See Specification page 4, line 36-page 5, line 2). The fatted dough may be docked and baked to produce the laminated crust. (See Specification page 5, lines 4-7).

The laminated crust of the claimed subject matter, as described above, has several important attributes. For example, the laminated crust of the invention increases the desirable flakiness and crispiness qualities of the crust. (See Specification, page 3, line 31). As another example, the laminated pizza crust of the invention is particularly well adapted to maintain its crispiness qualities when heated by microwave energy. (See Specification, page 3, line 31). Generally, the steps of proofing the dough before lamination, using margarine rather than shortening, baking rather than frying, and docking the product provide these desirable attributes.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL.

Whether the rejected claims are obvious under 35 U.S.C. §103(a) over U.S. Patent No. 4,623,542 to Wallin et al. (copy attached in the Evidence Appendix)?

ARGUMENT.

Whether claims 12, 13, 16-23 and 25-28 are obvious under §103(a) over Wallin et al.

As noted in the Final Office Action for the present case (copy attached in the Evidence Appendix), the Examiner has rejected claims 12, 13, 16-23, and 25-28 under 35 U.S.C. § 103(a) as being unpatentable over Wallin et al. (U.S. Patent No. 4,623,542). Specifically, Examiner states that Wallin et al. “disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flour, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked.” Examiner also stated that Wallin et al. “do not disclose using margarine, having pizza topping on the laminated crust and baking the laminated dough.”

The Examiner has taken official notice of several asserted facts to supply some of the claim limitations not disclosed by Wallin et al. First, the Examiner stated it would have been obvious to use margarine instead of shortening because it is well known in the art to use shortening, butter, or margarine alternatively. Further, the Examiner stated that butter and margarine are more expensive than shortening and give different taste and nutritional factors than shortening. Second, the Examiner stated that there is no identity standard to pizza because many types of toppings are used to form pizza, and that it would have been obvious to one skilled in the art to use a variety of filling to make different types of product. Finally, the Examiner stated that baking and frying are well known alternative cooking methods, wherein frying gives better texture but has the drawback of increasing the fat content, and that it would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content.

The Examiner bears the initial burden in establishing a prima facie case of obviousness when rejecting claims under 35 U.S.C. §103. In re Piasecki, 745 F.2d 1468, 223 USPQ 758 (Fed. Cir. 1985); In re Reuter, 651 F.2d 751, 210 USPQ 249 (CCPA 1981). If the Examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of non-obviousness.

To properly establish a prima facie case of obviousness, MPEP § 706.02(j) identifies three basic criteria that must be met. First, the prior art reference (or references when combined) must teach or suggest all of the claim limitations. Although official notice may be taken of facts outside of the record which are capable of instant and unquestionable demonstration as being “well known” in the art, applicants are allowed to traverse such notice and require the examiner to cite references or produce affidavits in support of the position taken. MPEP § 2144.03.

Second, there must be some suggestion or motivation in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or combine reference teachings. Finally, there must be a reasonable expectation of success. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Applicant respectfully traverses Examiner's assertion of obviousness and official notice that margarine, butter, and shortening are interchangeable. Using a dairy substitute such as margarine, or a dairy product such as butter, provides advantages over shortening in terms of taste and texture for a crispy crust suitable for microwave heating. This was at least partially suggested and acknowledged by the Examiner in the Office action when she stated that butter and margarine give different taste and nutritional factors than shortening. Further, the prior art cited by Examiner itself confirms this lack of interchangeability. Wallin et al. state that the roll-in shortening "may be any of the conventional hydrogenated vegetable oil shortenings available on the market," and do not suggest utilizing anything other than vegetable oil based shortening as their fattening agent. See Evidence Appendix, Wallin et al. patent, col. 10, lines 16-20. A primary objective of Wallin et al. is to provide a toaster pastry product which has a "flaky exterior surface and a breadly interior." See Evidence Appendix, Wallin et al. patent, col. 2, lines 20-25, and col. 11, lines 8-9.

It is believed that the use of shortening contributes to such breadly interior. For example, U.S. Patent No. 4,842,882 to Paulucci (of record and copy attached in the Evidence Appendix) uses shortening as the fattening agent when a porous, breadly quality is desired. It is also noted that the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, (copy attached in the Evidence Appendix) discusses the advantages of utilizing margarine rather than shortening flakes to avoid producing a breadly interior. See Evidence Appendix, Bubar

Declaration, paragraphs 10-11. Although the Examiner is correct that this declaration compares the claimed invention to Paulucci rather than Wallin, the declaration is relevant because Paulucci is similar to Wallin in this aspect. Therefore, the interchangeability of margarine like products and shortening is not a fact which is capable of instant and unquestionable demonstration as being “well known” in the art and, hence, all of the elements of the claimed invention have not been shown. Further, the use of margarine over shortening provides unexpected benefits in terms of the crispiness of the crust. Therefore, a prima facie case of obviousness has not been established.

In addition, the Examiner has indicated that there is no identity standard to pizza, and that any toppings may be applied to a crust to form a pizza, such as a dessert pizza having toppings such as fruit and cream. Applicant respectfully disagrees. One skilled in the art would recognize that pizza does have an identity standard regarding toppings. For example, *Webster's New Universal Unabridged Dictionary*, Barnes & Noble Books (1992) defines pizza as “a flat, open-faced pie of Italian origin, consisting of a crust topped with tomato sauce and cheese, often garnished with anchovies, sausage slices, mushrooms, bacon, olives, etc.” Although there may be references alluding to a “dessert pizza” having fruit and cream as a topping, the term “pizza” is being used facetiously to indicate that the dessert is generally shaped like a pizza, not that the dessert is an actual pizza.

Applicant also respectfully traverses Examiner's assertion of obviousness and official notice that baking and frying are well known alternative cooking methods, thereby suggesting that baking and frying are interchangeable. Frying the crust allows the exterior surface in contact with the oil to become dry and flaky, while leaving the interior breaded. Wallin et al. desire a pastry crust that has a flaky exterior surface and a breaded interior, and therefore fry their toaster

pastry. See Evidence Appendix, Wallin et al. patent, col. 2, lines 20-25 and col. 12, line 26. In contrast, the crust of the present invention has a crispy, non-bready quality throughout its interior. Baking the dough instead of frying the dough contributes to this crispy structure and helps to provide a crust suitable for use in a microwavable pizza. Therefore, although the determination of patentability in product by process claims is based on the product itself, baking the dough gives distinct and unexpected structural advantages over the prior art in terms of reducing bready qualities of the crust.

Further, the choice of whether to fry or bake depends on many factors besides the healthfulness of the food. Although increased fat content may indeed make a crust less healthy, it also changes important characteristics of the crust, such as its texture and feel. The frying step employed in Wallin et al. increases its total fat content by about 7% of the total weight of the cooked dough. See Evidence Appendix, Wallin et al. patent, col. 10, lines 4-15. An increase of this magnitude will impart a greasy feel to the crust. Such a greasy feel may be acceptable, or even desired, in a filled pastry product. However, such a greasy feel is not desirable in baked laminated dough suitable for use as a pizza crust. Hence, because the interchangeability of frying and baking is not a fact which is capable of instant and unquestionable demonstration as being “well known” in the art, all of the elements of the claimed invention have not been shown. In fact, frying and baking have been shown to provide and produce patently distinct characteristics in previously patented inventions (e.g. see U.S. Patent No. 4,170,659 to Totino et al.). Further, baking the dough provides distinct and unexpected advantages over frying the dough in producing a crispy crust. Therefore, a prima facie case of obviousness has not been established.

Further, the Examiner has not demonstrated other elements of the claimed invention,

either within the prior art or by taking official notice. Each currently pending independent claim calls for margarine layers to be distributed between layers of a proofed dough product. See Claims Appendix, claims 12, 17, and 27. Wallin et al. proof the dough after the shortening lamination step. See Evidence Appendix, Wallin et al. patent, col. 11 starting at line 64 (discussing proofing after lamination and before frying). It is believed that proofing of the dough before lamination reduces volume expansion of the dough after lamination, thereby reducing bready qualities and increasing crispiness qualities of the dough. Therefore, although the determination of patentability in product by process claims is based on the product itself, proofing the dough before lamination gives distinct and unexpected structural advantages over the prior art. Further, as stated in the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, “the step of proofing the dough *before* sheeting of the dough layers and the introduction of the smooth margarine also greatly affects the quality of the finished product.” See Evidence Appendix, Bubar declaration, paragraph 16 (emphasis in original). Again, although the Examiner is correct that this declaration compares the claimed invention to Paulucci and not to Wallin, the declaration is on point because Paulucci is similar to Wallin in this aspect. Hence, Examiner has not shown all of the claim limitations of the invention, either by prior art or by official notice, and has therefore not produced a prima facie case of obviousness.

Taken together, either alone or in combination, proofing the dough before lamination, utilizing margarine type products over shortening, baking the dough rather than frying, and docking provide distinct and unexpected benefits over the prior art and official notices taken by the Examiner. Specifically, these factors contribute to providing a crust that is crispy throughout its interior, rather than bready. Such a crust is suitable for use as a pizza crust, and is particularly suitable for use as a crust in a microwavable pizza.

CERTIFICATE OF MAILING

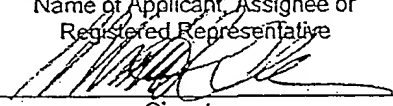
I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail, with sufficient postage, in an envelope addressed to: Assistant Commissioner for Patents, Washington, D.C. 20231, on

September 30, 1999

Date of Deposit

Michael P. Chu, Reg. No. 37,112

Name of Applicant, Assignee or
Registered Representative


Signature

9/30/99
Date of Signature

I hereby certify that this correspondence is being deposited with the United States Postal Service, with sufficient postage, as first class mail in an envelope addressed to:

Commissioner for Patents
Washington, D.C. 20231

on May 8, 2001

Date of Deposit

Michael P. Chu, Reg. No. 37,112

Name of applicant, assignee or
Registered Representative


Signature

5-8-01
Date of Signature

Our Case No. 4645/39-1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

RONALD O. BUBAR

Serial No.: 08/968,900

Filing Date: March 8, 1999

For: LAMINATED PIZZA CRUST

)
)
)
) Examiner Lien Tran

)
)
)
) Group Art Unit No. 1761

**DECLARATION OF RONALD O. BUBAR
UNDER 37 C.F.R. § 1.132**

Assistant Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

1. I, Ronald O. Bubar, am the named inventor for the above-captioned patent application.

2. I am employed by Luigino's, Inc. as its President. I have been employed by Luigino's since 1990. Luigino's specializes in frozen food products, many of which utilize frozen doughs.

3. I have been working in the field of mass-production dough-making since at least 1981.

4. I therefore believe that I am a person skilled in the art of dough-making and the mass-production of dough-related products.

5. Between the years of 1980 and 1985, I was employed by Jenos, Inc. in Duluth, Minnesota and Wellston, Ohio.

6. While employed at Jenos, Inc., I worked extensively with Mr. Jenio F. Paulucci in the area of production dough-making for frozen pizzas. At that time, Mr. Paulucci was also employed by Jenos, Inc. Mr. Paulucci is presently the assignee of the present patent application and the founder of Luigino's, Inc.

7. During my employment at Jenos, Inc., I worked extensively with Mr. Paulucci on a production method for making dough products and pizza crusts. Some of these are the methods and products disclosed in U.S. Patent No. 4,842,882 (the "882 patent"), which issued to Mr. Paulucci on June 27, 1989. I understand that the '882 patent is presently assigned to The Pillsbury Company as a result of their 1985 acquisition of Jenos, Inc.

8. From my work at Jenos, Inc. and with Mr. Jenio F. Paulucci, I am intimately familiar with the crust-making examples set forth in the '882 patent. I have therefore worked on both the laminated crust of the present invention and the crusts illustrated in the examples of the '882 patent. In particular, I am very familiar with "EXAMPLE 6" shown in column 10 of the '882 patent and the resulting dough and crust products associated therewith.

9. In general, as I had observed during numerous tests of the products, the dough crust products described in the '882 patent are "breadly" products that have a porous, open, rounded internal cellular structure. This is similar to the structure of a well-risen loaf of baked bread having a very airy interior.

10. Although Example 6 of the '882 patent states that the dough is "laminated" and that the finished crust is "laminated," the use of the term "laminated" in the example does not mean that the product described in Example 6 will produce layers of dough

separated by layers of fat. To the contrary, as I have noted above, the crust produced by Example 6 has a "breadly" porous interior without significant layer separation.

11. One reason for this result is that the method of Example 6 utilizes shortening flakes that are distributed in the dough. Because the flakes are relatively dry, and formed of separated particles that do not adhere to each other, the flakes end up distributed throughout the dough when the processing is completed. Since the dough is stretched, the flakes separate from each other and distribute throughout the dough in a random fashion.

12. Thus, the shortening flakes in Example 6 are introduced between the sheets of dough, but the final crust product is not "laminated" as the term is used in the present application. In other words, the resulting finished crust from Example 6 of the '882 patent does not exhibit a uniform, multi-layered structure of fat separating multiple layers of dough. The "lamination" term as used in the '882 patent instead relates to the adhesion between the upper and lower surfaces of the cooked pizza crust and the mere introduction of the flaked shortening between layers.

13: When developing the crust of the presently claimed invention method, the goal was to obtain a pizza crust that had a crisp outside and a flaked multi-layered interior similar to the interior of a croissant. Most importantly, a crust was sought that would retain those properties and be structurally stable after being frozen and reheated in a microwave oven. The method of Example 6 of the '882 patent resulted in a completely different crust compared to the present invention, one that was not microwaveable nor flaky (in the sense of a croissant-type structure as opposed to a porous-type structure), and therefore a completely different approach was taken and a drastically different method was developed to produce a crust having these unique, unconventional qualities.

14. I have performed numerous noncontemporaneous tests on products resulting from both of these methods.

15. There are several major differences between the method of the present invention and the method described in Example 6 of the '882 patent. For example, the extrusion of a smooth margarine at the claimed point in the instant process produces

even, homogeneous layers of fat that result in the multi-layered, laminated structure in the finished crust. This produces a croissant-like interior structure and a crispy outer crust. Margarine is an emulsified fat in a viscous form, and thereby exhibits spreading qualities very different from shortening flakes. The even distribution of fat between the layers of dough in the multi-layer structure, in addition to the other claimed process steps, makes the dough microwaveable.

16. Furthermore, the step of proofing the dough *before* sheeting of the dough layers and the introduction of the smooth margarine also greatly affects the quality of the finished product. In the example of the '882 patent, the dough is proofed *after* the sheeting process.

17. If one compares a cut-away cross-section of the baked crust of the Example 6 of the '882 patent side-by-side with a section of the crust of the present invention, distinct and unexpected differences in the qualities between the two are readily apparent. The crust of the present invention is more compact, but has many more large-flaked layers. The structure of the crust of the present invention is uniform due to the multiple uniform layers, and include large, thin flakes similar to a croissant. The crust of the present invention is also significantly more stable due to this structure in that it is crisper and more uniform after microwaving. In contrast, the crust made in accordance with Example 6 of the '882 patent is much thicker and includes very large pores in the interior. The flakes of dough in the interior of the crust are much smaller and distributed throughout the interior in a very random fashion. Furthermore, large, round, open pores are present throughout. This is noted on line 34 of column 10 of the '882 patent, which notes that the internal structure comprises "open cells ranging in size from 1/8-inch to 1/4-inch." These are large cells that would be undesirable for use in a microwaveable dough because these cells would fill with steam during microwaving and cause the crust to become soggy, unstable, and tough in some areas.

18. Similarly, if one compares side-by-side the cutaway portions of the crust of Example 6 with the crust of the present invention after both crusts are frozen and then microwaved, it is apparent that the structure of the crust of the present invention remains surprisingly intact and exhibits similar qualities to the freshly baked crust. In

contrast, the crust of Example 6 of the '882 patent exhibits a non-uniform, cardboard-like or soggy structure with collapsed pores that is not ideally suited for holding heavy pizza topping and supporting it through a microwaving process.

19. A summary of the observations of my tests is illustrated in the following data table:

PROPERTY OF CRUST OBSERVED	CRUST MADE ACCORDING TO THE '882 PATENT	CRUST MADE ACCORDING TO THE PRESENT INVENTION
Interior pores 0.125 to 0.25 inches in diameter	+	-
Crispy outer crust	+	+
Non-round, uniform interior pores	-	+
Multiple, evenly distributed layers of fat and dough	-	+
Uniform general interior structure	-	+
Structure remains intact after freezing and microwaving	-	+
Presence of large flakes	-	+

20. The resulting pizza crust exhibits the unique characteristics of being uniformly layered with fat and dough, thereby containing croissant-like large flakes between stable, crispy outer surfaces even after being frozen and microwaved. The dough retains this structure remarkably well even after baking, topping, freezing and reheating in a microwave oven. The crust of the Paulucci '882 patent does not exhibit the qualities of the present crust, including structural stability, large flaked layered structure and crisp upper and lower surfaces. The crust of the '882 patent also was not in our view a commercially desirable product after it was frozen and microwaved because it was too soggy, irregular and unstable.

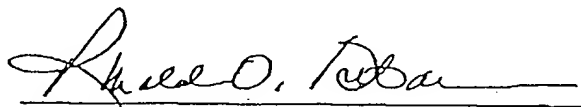
21. When the present invention was developed with the intention to produce a crust having the improved qualities of structural stability, large flaked layered structure and crisp upper and lower surfaces, the degree of improvement in microwavability of the

resulting crust over the crust produced in the '882 patent was unexpected and surprising. In this regard, the method of the '882 patent did not suggest that the claimed process steps would produce a product having such improved microwavable properties. These properties are so improved over what has been done previously that Luigino's has used the resulting crust product in a number of commercially successful products other than pizzas.

22. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Dated: _____

9/30/99

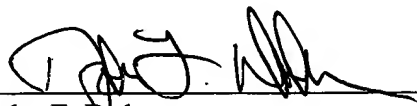


Ronald O. Bubar

Reversal of the rejection of claims 12, 13, 16-23 and 25-28 is believed warranted and is solicited.

Respectfully submitted,

Dated: July 12, 2005



John F. Dolan
Reg. No. 45,382
Customer No. 22859
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7000

#3143196\1

CLAIMS APPENDIX

12. A laminated crust dough comprising:
a multi-layered dough lamination incorporating a plurality of margarine layers distributed between layers of a proofed dough product, said lamination formed by forming the dough product into a sheet, extruding a margarine layer thereon, manipulating the sheet and margarine to produce a folded dough having a plurality of margarine layers distributed between layers of the dough product, and docking said folded dough to form a laminated crust dough having a plurality of puncture openings.
13. The laminated crust dough of claim 12 wherein said sheet and margarine are manipulated by folding said sheet over said margarine layer to form a fatted dough, stretching said fatted dough into a fatted sheet using a first stretching means including a series of rollers applied to said fatted dough, distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor, and reforming said fatted sheet to a predetermined thickness.
15. The laminated crust dough of claim 12 wherein said crust is formed into pizza shapes and baked in an oven.
16. The laminated crust dough of claim 12 wherein said dough product further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.
17. A laminated crust dough pizza comprising
a plurality of layers including, margarine distributed between layers of dough formed by proofing a dough sheet;

extruding a margarine layer onto said dough sheet;
folding said sheet over said margarine layer to form a fatted dough;
stretching said fatted dough into a fatted sheet using a first stretching means, said first stretching means including a series of rollers applied to said fatted dough;
distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor;
reforming said fatted sheet to a predetermined thickness, wherein said folding, stretching, distributing and reforming steps produce a folded dough having a plurality of margarine layers distributed between layers of dough;
docking said folded dough to form a laminated crust dough; and
applying one or more pizza toppings to said laminated crust dough.

18. The crust dough pizza of claim 17 wherein the steps of reforming said fatted sheet to a predetermined thickness further comprises:

stretching said fatted sheet using a second stretching means, said second stretching means including a series of rollers;
distributing said fatted sheet onto a conveyor using a second piling means to overlap said fatted sheet on said conveyor; and
rolling said fatted sheet to a predetermined thickness using a plurality of second rolling means.

19. The crust dough pizza of claim 17 wherein said first stretching means further comprises a series of rollers that are mounted for rotation over a conveyor.

20. The crust dough pizza of claim 17 wherein said dough layers further comprise approximately 60 percent flour, 1.25 percent margarine and 32 percent water.

21. The laminated crust dough of claim 12 wherein the margarine of said margarine layers is equal to 10% of the total weight of the dough.
22. The crust dough pizza of claim 17 wherein said margarine is equal to 10% of the total weight of the dough.
23. The crust dough pizza of claim 17 further including the step of baking said laminated crust dough before applying said pizza toppings.
25. The laminated crust of claim 27 wherein the margarine of said margarine layers is equal to 10% of the total weight of the dough.
26. The laminated crust of claim 27 wherein said dough layers further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.
27. A laminated crust comprising a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough, said fatted dough is docked and baked to produce the laminated crust.
28. The laminated crust of claim 27 wherein taste and texture of the laminated crust does not significantly degrade upon microwaving or freezing.

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

PATENT NO. : 4,623,542
DATED : November 18, 1986
INVENTOR(S) : Glenn Wallin, et al.

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

Cover page at [63] insert ", now U.S. Patent 4,612,198
issued September 16, 1986" after "1982".

Claim 11, line 12 "2.5%" should be "3.5%".

Claim 11, line 13 "0.1%" should be "0.15%".

Signed and Sealed this
Twelfth Day of January, 1988

Attest:

DONALD J. QUIGG

Attesting Officer

Commissioner of Patents and Trademarks

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail, with sufficient postage, in an envelope addressed to: Assistant Commissioner for Patents, Washington, D.C. 20231, on

Date of Deposit

Name of Applicant, Assignee or
Registered Representative

Signature

Date of Signature

on May 8, 2001

Date of Deposit

Michael P. Chu, Reg. No. 37,112

Name of applicant, assignee or
Registered Representative

Signature

Date of Signature

Our Case No. 4645/39-1

In re Application of:

RONALD O. BUBAR

Serial No.: 08/968,900

Filing Date: March 8, 1999

For: LAMINATED PIZZA CRUST

Examiner Lien Tran

Group Art Unit No. 1761

Assistant Commissioner for Patents
Washington, D.C. 20231

Dear Sir,

1. I, Ronald O. Bubar, am the named inventor for the above-captioned patent application.
2. I am employed by Luigino's, Inc. as its President. I have been employed by Luigino's since 1990. Luigino's specializes in frozen food products, many of which utilize frozen doughs.

3. I have been working in the field of mass-production dough-making since at least 1981.

4. I therefore believe that I am a person skilled in the art of dough-making and the mass-production of dough-related products.

5. Between the years of 1980 and 1985, I was employed by Jenos's, Inc. in Duluth, Minnesota and Wellston, Ohio.

6. While employed at Jenos's, Inc., I worked extensively with Mr. Jenos F. Paulucci in the area of production dough-making for frozen pizzas. At that time, Mr. Paulucci was also employed by Jenos's Inc. Mr. Paulucci is presently the assignee of the present patent application and the founder of Luigino's, Inc.

7. During my employment at Jenos's, Inc., I worked extensively with Mr. Paulucci on a production method for making dough products and pizza crusts. Some of these are the methods and products disclosed in U.S. Patent No. 4,842,882 (the "882 patent"), which issued to Mr. Paulucci on June 27, 1989. I understand that the '882 patent is presently assigned to The Pillsbury Company as a result of their 1985 acquisition of Jenos's, Inc.

8. From my work at Jenos's, Inc. and with Mr. Jenos F. Paulucci, I am intimately familiar with the crust-making examples set forth in the '882 patent. I have therefore worked on both the laminated crust of the present invention and the crusts illustrated in the examples of the '882 patent. In particular, I am very familiar with "EXAMPLE 6" shown in column 10 of the '882 patent and the resulting dough and crust products associated therewith.

9. In general, as I had observed during numerous tests of the products, the dough crust products described in the '882 patent are "bready" products that have a porous, open, rounded internal cellular structure. This is similar to the structure of a well-risen loaf of baked bread having a very airy interior.

10. Although Example 6 of the '882 patent states that the dough is "laminated" and that the finished crust is "laminated," the use of the term "laminated" in the example does not mean that the product described in Example 6 will produce layers of dough

separated by layers of fat. To the contrary, as I have noted above, the crust produced by Example 6 has a "breadly" porous interior without significant layer separation.

11. One reason for this result is that the method of Example 6 utilizes shortening flakes that are distributed in the dough. Because the flakes are relatively dry, and formed of separated particles that do not adhere to each other, the flakes end up distributed throughout the dough when the processing is completed. Since the dough is stretched, the flakes separate from each other and distribute throughout the dough in a random fashion.

12. Thus, the shortening flakes in Example 6 are introduced between the sheets of dough, but the final crust product is not "laminated" as the term is used in the present application. In other words, the resulting finished crust from Example 6 of the '882 patent does not exhibit a uniform, multi-layered structure of fat separating multiple layers of dough. The "lamination" term as used in the '882 patent instead relates to the adhesion between the upper and lower surfaces of the cooked pizza crust and the mere introduction of the flaked shortening between layers.

13: When developing the crust of the presently claimed invention method, the goal was to obtain a pizza crust that had a crisp outside and a flaked multi-layered interior similar to the interior of a croissant. Most importantly, a crust was sought that would retain those properties and be structurally stable after being frozen and reheated in a microwave oven. The method of Example 6 of the '882 patent resulted in a completely different crust compared to the present invention, one that was not microwaveable nor flaky (in the sense of a croissant-type structure as opposed to a porous-type structure), and therefore a completely different approach was taken and a drastically different method was developed to produce a crust having these unique, unconventional qualities.

14. I have performed numerous noncontemporaneous tests on products resulting from both of these methods.

15. There are several major differences between the method of the present invention and the method described in Example 6 of the '882 patent. For example, the extrusion of a smooth margarine at the claimed point in the instant process produces

even, homogeneous layers of fat that result in the multi-layered, laminated structure in the finished crust. This produces a croissant-like interior structure and a crispy outer crust. Margarine is an emulsified fat in a viscous form, and thereby exhibits spreading qualities very different from shortening flakes. The even distribution of fat between the layers of dough in the multi-layer structure, in addition to the other claimed process steps, makes the dough microwaveable.

16. Furthermore, the step of proofing the dough *before* sheeting of the dough layers and the introduction of the smooth margarine also greatly affects the quality of the finished product. In the example of the '882 patent, the dough is proofed *after* the sheeting process.

17. If one compares a cut-away cross-section of the baked crust of the Example 6 of the '882 patent side-by-side with a section of the crust of the present invention, distinct and unexpected differences in the qualities between the two are readily apparent. The crust of the present invention is more compact, but has many more large-flaked layers. The structure of the crust of the present invention is uniform due to the multiple uniform layers, and include large, thin flakes similar to a croissant. The crust of the present invention is also significantly more stable due to this structure in that it is crisper and more uniform after microwaving. In contrast, the crust made in accordance with Example 6 of the '882 patent is much thicker and includes very large pores in the interior. The flakes of dough in the interior of the crust are much smaller and distributed throughout the interior in a very random fashion. Furthermore, large, round, open pores are present throughout. This is noted on line 34 of column 10 of the '882 patent, which notes that the internal structure comprises "open cells ranging in size from 1/8-inch to 1/4-inch." These are large cells that would be undesirable for use in a microwaveable dough because these cells would fill with steam during microwaving and cause the crust to become soggy, unstable, and tough in some areas.

18. Similarly, if one compares side-by-side the cutaway portions of the crust of Example 6 with the crust of the present invention after both crusts are frozen and then microwaved, it is apparent that the structure of the crust of the present invention remains surprisingly intact and exhibits similar qualities to the freshly baked crust. In

contrast, the crust of Example 6 of the '882 patent exhibits a non-uniform, cardboard-like or soggy structure with collapsed pores that is not ideally suited for holding heavy pizza topping and supporting it through a microwaving process.

19. A summary of the observations of my tests is illustrated in the following data table:

PROPERTY OF CRUST OBSERVED	CRUST MADE ACCORDING TO THE '882 PATENT	CRUST MADE ACCORDING TO THE PRESENT INVENTION
Interior pores 0.125 to 0.25 inches in diameter	+	-
Crispy outer crust	+	+
Non-round, uniform interior pores	-	+
Multiple, evenly distributed layers of fat and dough	-	+
Uniform general interior structure	-	+
Structure remains intact after freezing and microwaving	-	+
Presence of large flakes	-	+

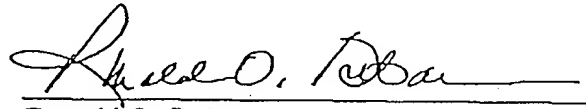
20. The resulting pizza crust exhibits the unique characteristics of being uniformly layered with fat and dough, thereby containing croissant-like large flakes between stable, crispy outer surfaces even after being frozen and microwaved. The dough retains this structure remarkably well even after baking, topping, freezing and reheating in a microwave oven. The crust of the Paulucci '882 patent does not exhibit the qualities of the present crust, including structural stability, large flaked layered structure and crisp upper and lower surfaces. The crust of the '882 patent also was not in our view a commercially desirable product after it was frozen and microwaved because it was too soggy, irregular and unstable.

21. When the present invention was developed with the intention to produce a crust having the improved qualities of structural stability, large flaked layered structure and crisp upper and lower surfaces, the degree of improvement in microwavability of the

resulting crust over the crust produced in the '882 patent was unexpected and surprising. In this regard, the method of the '882 patent did not suggest that the claimed process steps would produce a product having such improved microwavable properties. These properties are so improved over what has been done previously that Luigino's has used the resulting crust product in a number of commercially successful products other than pizzas.

22. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Dated: 9/30/99



Ronald O. Bubar



PTO/SB/21 (09-04)
Approved for use through 07/31/2006. OMB 0651-0031
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission 53 (x3)

Application Number	09/535,067
Filing Date	March 23, 2000
First Named Inventor	BUBAR
Art Unit	1761
Examiner Name	Tran Lien, T.
Attorney Docket Number	45768.2001.3

ENCLOSURES (Check all that apply)

<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment/Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input checked="" type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/ Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input checked="" type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): Return Postcard.
---	--	---

Remarks

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	Fredrikson & Byron, PA		
Signature			
Printed name	John F. Dolan		
Date	July 12, 2005	Reg. No.	45,382

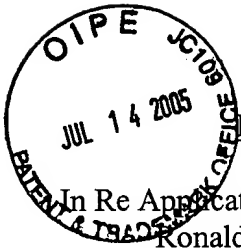
CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

Signature			
Typed or printed name	Joelen R. Krueger	Date	July 12, 2005

This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 2 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of
Ronald O. Bubar

) Examiner: Tran Lien, T.

) Art Unit: 1761

)

Serial No.: 09/535,067

) Atty. Docket No. 45768.2001.3

)

Filed: March 23, 2000

)

)

For: LAMINATED PIZZA CRUST

)

To: Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF (37 C.F.R § 1.192)

This is an appeal of the Examiner's final rejection of claims 12, 13, 16-23 and 25-28, issued on July 21, 2004. This brief is transmitted in triplicate.

REAL PARTY IN INTEREST.

This application has been assigned to Jeno F. Paulucci.

RELATED APPEALS AND INTERFERENCES.

There are no other appeals or interferences related to this appeal. Accordingly, this section is inapplicable.

STATUS OF CLAIMS.

Claims 12, 13, 16-23 and 25-28 are pending in the case and have been finally rejected. A

copy of the appealed claims is attached as a Claims Appendix. Claims 8-11 have been withdrawn from consideration, and claims 1-7, 14, and 24 have been cancelled without prejudice. Note that claim 15 is presently pending and not withdrawn, but has not been indicated allowable or rejected by the Examiner. However, claim 15 is included in the claims listed in the Claims Appendix.

STATUS OF AMENDMENTS.

Since the Examiner issued the final rejection, Applicant filed its Notice of Appeal on October 21, 2004, without further amendment.

SUMMARY OF CLAIMED SUBJECT MATTER.

The claimed subject matter includes a laminated crust suitable for use as a pizza crust. (See Specification page 3, line 5). Generally, consumers desire a pizza crust having crispy characteristics. (See Specification page 1, line 18). However, providing a crispy crust for pizza that is frozen and must be reheated, such as with microwave energy, has traditionally not been attainable. (See Specification page 1, line 18). The laminated crust of the claimed subject matter improves these qualities compared to the prior art. (See Specification page 3, line 5).

In the claims at issue, the crust comprises a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough. (See Claims Appendix, independent claims 12, 17, and 27). Independent claim twelve includes a laminated crust dough comprising a multi-layered dough lamination incorporating a plurality of margarine layers distributed between layers of a proofed dough product. The lamination may be formed by

forming the dough product into a sheet, extruding a margarine layer thereon, manipulating the sheet and margarine to produce a folded dough having a plurality of margarine layers distributed between layers of the dough product, and docking the folded dough to form a laminated crust dough having a plurality of puncture openings. (See Specification page 4, line 36 through page 5, line 7, and Figure 1, reference characters 12-15).

Independent claim seventeen includes a laminated crust dough pizza comprising a plurality of layers including margarine distributed between layers of dough. The plurality of layers of margarine distributed between layers of dough may be formed by proofing a dough sheet, extruding a margarine layer onto the dough sheet, folding the sheet over the margarine layer to form a fatted dough, stretching the fatted dough into a fatted sheet using a first stretching means including a series of rollers applied to the fatted dough, distributing the fatted sheet onto a conveyor using a first piling means to overlap the fatted sheet on the conveyor, and reforming the fatted sheet to a predetermined thickness. (See Specification page 4, line 36 through page 5, line 7, page 7, lines 3-14, Figure 1, reference characters 12-15, and Figure 3). The folding, stretching, distributing and reforming steps produce a folded dough having a plurality of margarine layers distributed between layers of dough. The folded dough may be docked to form a laminated crust dough and one or more pizza toppings may be applied to the laminated crust dough. (See Specification page 5, lines 4-7).

Independent claim twenty-seven includes a laminated crust comprising a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough. (See Specification page 4, line 36-page 5, line 2). The fatted dough may be docked and baked to produce the laminated crust. (See Specification page 5, lines 4-7).

The laminated crust of the claimed subject matter, as described above, has several important attributes. For example, the laminated crust of the invention increases the desirable flakiness and crispiness qualities of the crust. (See Specification, page 3, line 31). As another example, the laminated pizza crust of the invention is particularly well adapted to maintain its crispiness qualities when heated by microwave energy. (See Specification, page 3, line 31). Generally, the steps of proofing the dough before lamination, using margarine rather than shortening, baking rather than frying, and docking the product provide these desirable attributes.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL.

Whether the rejected claims are obvious under 35 U.S.C. §103(a) over U.S. Patent No. 4,623,542 to Wallin et al. (copy attached in the Evidence Appendix)?

ARGUMENT.

Whether claims 12, 13, 16-23 and 25-28 are obvious under §103(a) over Wallin et al.

As noted in the Final Office Action for the present case (copy attached in the Evidence Appendix), the Examiner has rejected claims 12, 13, 16-23, and 25-28 under 35 U.S.C. § 103(a) as being unpatentable over Wallin et al. (U.S. Patent No. 4,623,542). Specifically, Examiner states that Wallin et al. “disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flour, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked.” Examiner also stated that Wallin et al. “do not disclose using margarine, having pizza topping on the laminated crust and baking the laminated dough.”

The Examiner has taken official notice of several asserted facts to supply some of the claim limitations not disclosed by Wallin et al. First, the Examiner stated it would have been obvious to use margarine instead of shortening because it is well known in the art to use shortening, butter, or margarine alternatively. Further, the Examiner stated that butter and margarine are more expensive than shortening and give different taste and nutritional factors than shortening. Second, the Examiner stated that there is no identity standard to pizza because many types of toppings are used to form pizza, and that it would have been obvious to one skilled in the art to use a variety of filling to make different types of product. Finally, the Examiner stated that baking and frying are well known alternative cooking methods, wherein frying gives better texture but has the drawback of increasing the fat content, and that it would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content.

The Examiner bears the initial burden in establishing a prima facie case of obviousness when rejecting claims under 35 U.S.C. §103. In re Piasecki, 745 F.2d 1468, 223 USPQ 758 (Fed. Cir. 1985); In re Reuter, 651 F.2d 751, 210 USPQ 249 (CCPA 1981). If the Examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of non-obviousness.

To properly establish a prima facie case of obviousness, MPEP § 706.02(j) identifies three basic criteria that must be met. First, the prior art reference (or references when combined) must teach or suggest all of the claim limitations. Although official notice may be taken of facts outside of the record which are capable of instant and unquestionable demonstration as being “well known” in the art, applicants are allowed to traverse such notice and require the examiner to cite references or produce affidavits in support of the position taken. MPEP § 2144.03.

Second, there must be some suggestion or motivation in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or combine reference teachings. Finally, there must be a reasonable expectation of success. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Applicant respectfully traverses Examiner's assertion of obviousness and official notice that margarine, butter, and shortening are interchangeable. Using a dairy substitute such as margarine, or a dairy product such as butter, provides advantages over shortening in terms of taste and texture for a crispy crust suitable for microwave heating. This was at least partially suggested and acknowledged by the Examiner in the Office action when she stated that butter and margarine give different taste and nutritional factors than shortening. Further, the prior art cited by Examiner itself confirms this lack of interchangeability. Wallin et al. state that the roll-in shortening "may be any of the conventional hydrogenated vegetable oil shortenings available on the market," and do not suggest utilizing anything other than vegetable oil based shortening as their fattening agent. See Evidence Appendix, Wallin et al. patent, col. 10, lines 16-20. A primary objective of Wallin et al. is to provide a toaster pastry product which has a "flaky exterior surface and a bready interior." See Evidence Appendix, Wallin et al. patent, col. 2, lines 20-25, and col. 11, lines 8-9.

It is believed that the use of shortening contributes to such bready interior. For example, U.S. Patent No. 4,842,882 to Paulucci (of record and copy attached in the Evidence Appendix) uses shortening as the fattening agent when a porous, bready quality is desired. It is also noted that the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, (copy attached in the Evidence Appendix) discusses the advantages of utilizing margarine rather than shortening flakes to avoid producing a bready interior. See Evidence Appendix, Bubar

Declaration, paragraphs 10-11. Although the Examiner is correct that this declaration compares the claimed invention to Paulucci rather than Wallin, the declaration is relevant because Paulucci is similar to Wallin in this aspect. Therefore, the interchangeability of margarine like products and shortening is not a fact which is capable of instant and unquestionable demonstration as being “well known” in the art and, hence, all of the elements of the claimed invention have not been shown. Further, the use of margarine over shortening provides unexpected benefits in terms of the crispiness of the crust. Therefore, a prima facie case of obviousness has not been established.

In addition, the Examiner has indicated that there is no identity standard to pizza, and that any toppings may be applied to a crust to form a pizza, such as a dessert pizza having toppings such as fruit and cream. Applicant respectfully disagrees. One skilled in the art would recognize that pizza does have an identity standard regarding toppings. For example, *Webster's New Universal Unabridged Dictionary*, Barnes & Noble Books (1992) defines pizza as “a flat, open-faced pie of Italian origin, consisting of a crust topped with tomato sauce and cheese, often garnished with anchovies, sausage slices, mushrooms, bacon, olives, etc.” Although there may be references alluding to a “dessert pizza” having fruit and cream as a topping, the term “pizza” is being used facetiously to indicate that the dessert is generally shaped like a pizza, not that the dessert is an actual pizza.

Applicant also respectfully traverses Examiner's assertion of obviousness and official notice that baking and frying are well known alternative cooking methods, thereby suggesting that baking and frying are interchangeable. Frying the crust allows the exterior surface in contact with the oil to become dry and flaky, while leaving the interior breaded. Wallin et al. desire a pastry crust that has a flaky exterior surface and a breaded interior, and therefore fry their toaster

pastry. See Evidence Appendix, Wallin et al. patent, col. 2, lines 20-25 and col. 12, line 26. In contrast, the crust of the present invention has a crispy, non-bready quality throughout its interior. Baking the dough instead of frying the dough contributes to this crispy structure and helps to provide a crust suitable for use in a microwavable pizza. Therefore, although the determination of patentability in product by process claims is based on the product itself, baking the dough gives distinct and unexpected structural advantages over the prior art in terms of reducing bready qualities of the crust.

Further, the choice of whether to fry or bake depends on many factors besides the healthfulness of the food. Although increased fat content may indeed make a crust less healthy, it also changes important characteristics of the crust, such as its texture and feel. The frying step employed in Wallin et al. increases its total fat content by about 7% of the total weight of the cooked dough. See Evidence Appendix, Wallin et al. patent, col. 10, lines 4-15. An increase of this magnitude will impart a greasy feel to the crust. Such a greasy feel may be acceptable, or even desired, in a filled pastry product. However, such a greasy feel is not desirable in baked laminated dough suitable for use as a pizza crust. Hence, because the interchangeability of frying and baking is not a fact which is capable of instant and unquestionable demonstration as being “well known” in the art, all of the elements of the claimed invention have not been shown. In fact, frying and baking have been shown to provide and produce patently distinct characteristics in previously patented inventions (e.g. see U.S. Patent No. 4,170,659 to Totino et al.). Further, baking the dough provides distinct and unexpected advantages over frying the dough in producing a crispy crust. Therefore, a prima facie case of obviousness has not been established.

Further, the Examiner has not demonstrated other elements of the claimed invention,


either within the prior art or by taking official notice. Each currently pending independent claim calls for margarine layers to be distributed between layers of a proofed dough product. See Claims Appendix, claims 12, 17, and 27. Wallin et al. proof the dough after the shortening lamination step. See Evidence Appendix, Wallin et al. patent, col. 11 starting at line 64 (discussing proofing after lamination and before frying). It is believed that proofing of the dough before lamination reduces volume expansion of the dough after lamination, thereby reducing bread qualities and increasing crispiness qualities of the dough. Therefore, although the determination of patentability in product by process claims is based on the product itself, proofing the dough before lamination gives distinct and unexpected structural advantages over the prior art. Further, as stated in the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, “the step of proofing the dough *before* sheeting of the dough layers and the introduction of the smooth margarine also greatly affects the quality of the finished product.” See Evidence Appendix, Bubar declaration, paragraph 16 (emphasis in original). Again, although the Examiner is correct that this declaration compares the claimed invention to Paulucci and not to Wallin, the declaration is on point because Paulucci is similar to Wallin in this aspect. Hence, Examiner has not shown all of the claim limitations of the invention, either by prior art or by official notice, and has therefore not produced a prima facie case of obviousness.

Taken together, either alone or in combination, proofing the dough before lamination, utilizing margarine type products over shortening, baking the dough rather than frying, and docking provide distinct and unexpected benefits over the prior art and official notices taken by the Examiner. Specifically, these factors contribute to providing a crust that is crispy throughout its interior, rather than bread. Such a crust is suitable for use as a pizza crust, and is particularly suitable for use as a crust in a microwavable pizza.

Reversal of the rejection of claims 12, 13, 16-23 and 25-28 is believed warranted and is solicited.

Respectfully submitted,

Dated: July 12, 2005



John F. Dolan
Reg. No. 45,382
Customer No. 22859
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7000

#3143196\1

CLAIMS APPENDIX

12. A laminated crust dough comprising:
a multi-layered dough lamination incorporating a plurality of margarine layers distributed between layers of a proofed dough product, said lamination formed by forming the dough product into a sheet, extruding a margarine layer thereon, manipulating the sheet and margarine to produce a folded dough having a plurality of margarine layers distributed between layers of the dough product, and docking said folded dough to form a laminated crust dough having a plurality of puncture openings.
13. The laminated crust dough of claim 12 wherein said sheet and margarine are manipulated by folding said sheet over said margarine layer to form a fatted dough, stretching said fatted dough into a fatted sheet using a first stretching means including a series of rollers applied to said fatted dough, distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor, and reforming said fatted sheet to a predetermined thickness.
15. The laminated crust dough of claim 12 wherein said crust is formed into pizza shapes and baked in an oven.
16. The laminated crust dough of claim 12 wherein said dough product further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.
17. A laminated crust dough pizza comprising
a plurality of layers including, margarine distributed between layers of dough formed by proofing a dough sheet;

extruding a margarine layer onto said dough sheet;
folding said sheet over said margarine layer to form a fatted dough;
stretching said fatted dough into a fatted sheet using a first stretching means, said first stretching means including a series of rollers applied to said fatted dough;
distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor;
reforming said fatted sheet to a predetermined thickness, wherein said folding, stretching, distributing and reforming steps produce a folded dough having a plurality of margarine layers distributed between layers of dough;
docking said folded dough to form a laminated crust dough; and
applying one or more pizza toppings to said laminated crust dough.

18. The crust dough pizza of claim 17 wherein the steps of reforming said fatted sheet to a predetermined thickness further comprises:

stretching said fatted sheet using a second stretching means, said second stretching means including a series of rollers;
distributing said fatted sheet onto a conveyor using a second piling means to overlap said fatted sheet on said conveyor; and
rolling said fatted sheet to a predetermined thickness using a plurality of second rolling means.

19. The crust dough pizza of claim 17 wherein said first stretching means further comprises a series of rollers that are mounted for rotation over a conveyor.

20. The crust dough pizza of claim 17 wherein said dough layers further comprise approximately 60 percent flour, 1.25 percent margarine and 32 percent water.

21. The laminated crust dough of claim 12 wherein the margarine of said margarine layers is equal to 10% of the total weight of the dough.
22. The crust dough pizza of claim 17 wherein said margarine is equal to 10% of the total weight of the dough.
23. The crust dough pizza of claim 17 further including the step of baking said laminated crust dough before applying said pizza toppings.
25. The laminated crust of claim 27 wherein the margarine of said margarine layers is equal to 10% of the total weight of the dough.
26. The laminated crust of claim 27 wherein said dough layers further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.
27. A laminated crust comprising a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough, said fatted dough is docked and baked to produce the laminated crust.
28. The laminated crust of claim 27 wherein taste and texture of the laminated crust does not significantly degrade upon microwaving or freezing.

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

PATENT NO. : 4,623,542
DATED : November 18, 1986
INVENTOR(S) : Glenn Wallin, et al.

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

Cover page at [63] insert ", now U.S. Patent 4,612,198
issued September 16, 1986" after "1982".

Claim 11, line 12 "2.5%" should be "3.5%".

Claim 11, line 13 "0.1%" should be "0.15%".

Signed and Sealed this
Twelfth Day of January, 1988

Attest:

DONALD I. QUIGG

Attesting Officer

Commissioner of Patents and Trademarks



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/535,067	03/23/2000	Ronald O. Bubar	4645/31	1606

22859 7590 07/21/2004

INTELLECTUAL PROPERTY GROUP
FREDRIKSON & BYRON, P.A.
200 SOUTH SIXTH STREET
SUITE 4000
MINNEAPOLIS, MN 55402

EXAMINER

TRAN LIEN, THUY

ART UNIT PAPER NUMBER

1761

DATE MAILED: 07/21/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Response due: 10.21.04 Final D.A.

Docketed 7.26.04 atg

RECEIVED

JUL 26 2004

INTELLECTUAL PROPERTY DEPARTMENT

Office Action Summary

Application No.

09/535,067

Applicant(s)

BUBAR, RONALD O.

Examiner

Lien T Tran

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 April 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 12,13,16-23 and 25-28 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 12,13,16-23 and 25-28 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date. _____ | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1761

Claims 12-13, 16, 17-23 and 25-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wallin et al (4623542).

Wallin et al disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flour, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked. (see col. 7 lines 22-48, col. 11 lines 26-30 and 64-68, col. 10 lines 1-2)

Wallin et al do not disclose using margarine, having pizza topping on the laminated crust and baking the laminated dough.

It would have been obvious to one skilled in the art to use margarine instead of shortening because it is well known in the art to use shortening, butter or margarine alternatively. Butter and margarine are more expensive than shortening and give different taste and nutritional factor from shortening. It would have been obvious to one skilled in the art to select butter, margarine or shortening taking into consideration the above factors. As to applying pizza topping or forming a pizza, there is no identity standard to pizza because many types of topping are used to form pizza. For example, there are dessert pizza having fruit and cream. It would have been obvious to one skilled in the art to use a variety of filling to make different types of product. For example, it would have been obvious to use tomato and cheese filling if one wants to make a breakfast pizza. Such concept is well known in the art; for instance, there is breakfast burrito, breakfast taco etc.. There is also pizza pocket which has the same structure as the one disclosed by Wallin et al. While Wallin et al teach to fry the

Art Unit: 1761

product, baking and frying are well known alternative cooking methods. Frying gives a better texture but has the drawn back of increasing the fat content. It would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content. This alternative is known in the art; for example, there are potato chips that are fried and there are reduced-fat potato chip that are baked. The Wallin et al product also differs from the claimed product in the way it is made. However, determination of patentability in product-by-process claims is based on the product itself.

In the response filed 4/23/2004, applicant argues Wallin et al proof the dough after the shortening lamination step; applicant states proofing the dough before lamination gives distinct and unexpected structural advantage over the prior art. This argument is not persuasive. Whether the dough is proofed before lamination or after lamination, the final product comprises proofed dough layers. Applicant's claims are directed at the product, not the process of making it. Applicant argues, proofing before lamination gives unexpected result; however, applicant does not have any showing of the claimed product over the Wallin et al product. The declaration applicant makes reference to is not a comparison between the claimed product and the Wallin et al product. Applicant further argues the margarine, butter and shortening can not be used interchangeably and Wallin et al do not suggest using anything other than vegetable oil based shortening. The examiner respectfully disagrees with applicant. It is well known in baking to use shortening, butter and margarine interchangeably. The decision to use any of the well known fats is based on several factors. Butter and margarine give better

Art Unit: 1761

taste and flavor but they are more expensive than shortening and are not as stable.

Shortening is cheaper and provides more shelf stability. Thus, the decision to use any of the well known fats would have been an obvious matter of reference depending on which factor one deems more important. As evidence that it is well known to substitute shortening with margarine or butter or vice versa, the examiner will submit papers which teach such substitution. For example, the Kitchen Tips teach to substitute shortening with margarine. The Crisco products teach that shortening can be substituted for butter or margarine. If shortening can be substituted for margarine or butter, it is obvious margarine can be used in place of shortening. While the Crisco paper does not have a date, the product has been around for a long time. The question of using shortening or butter or margarine is the one based on taste, texture and flavor versus expense and stability. The choice to be made is based on which factor is deemed more important. Applicant further argues that baking and frying as known cooking alternatives does not hold true for mass production food processors or recipe formulators. The basis of this argument is not clear. What mass production or recipe formulators does applicant refer to. Applicant argues baking gives unexpected result in terms of reducing bread qualities of the crust. This argument is not supported by factual evidence and there is no limitation with respect to texture in the claims. Applicant further argues the choice of frying or baking depends on many factors besides the healthfulness of the food. What applicant says is true, but it does not take away the fact that such alternative is well known and would have been obvious to one skilled in the art. Some foods taste better when they are fried, but that does not mean that they

Art Unit: 1761

can not be baked. Thus, the choice between baking and frying is one that is based on taste, flavor, texture versus the fat content, calorie content and healthfulness.

Applicant's arguments filed 4/23/04 have been fully considered but they are not persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Tuesday, Wednesday and Friday.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 1761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

July 11, 2004

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700



CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail, with sufficient postage, in an envelope addressed to: Assistant Commissioner for Patents, Washington, D.C. 20231, on

September 30, 1999

Date of Deposit

Michael P. Chu, Reg. No. 37,112

Name of Applicant, Assignee or
Registered Representative

Signature

Date of Signature

I hereby certify that this correspondence is being deposited with the United States Postal Service, with sufficient postage, as first class mail in an envelope addressed to:

Commissioner for Patents
Washington, D.C. 20231

on May 8, 2001

Date of Deposit

Michael P. Chu, Reg. No. 37,112

Name of applicant, assignee or
Registered Representative

Signature

Date of Signature

Our Case No. 4645/39-1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

RONALD O. BUBAR

Serial No.: 08/968,900

Filing Date: March 8, 1999

For: LAMINATED PIZZA CRUST

Examiner Lien Tran

Group Art Unit No. 1761

DECLARATION OF RONALD O. BUBAR UNDER 37 C.F.R. § 1.132

Assistant Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

1. I, Ronald O. Bubar, am the named inventor for the above-captioned patent application.

2. I am employed by Luigino's, Inc. as its President. I have been employed by Luigino's since 1990. Luigino's specializes in frozen food products, many of which utilize frozen doughs.

3. I have been working in the field of mass-production dough-making since at least 1981.

4. I therefore believe that I am a person skilled in the art of dough-making and the mass-production of dough-related products.

5. Between the years of 1980 and 1985, I was employed by Jenos, Inc. in Duluth, Minnesota and Wellston, Ohio.

6. While employed at Jenos, Inc., I worked extensively with Mr. Jenio F. Paulucci in the area of production dough-making for frozen pizzas. At that time, Mr. Paulucci was also employed by Jenos Inc. Mr. Paulucci is presently the assignee of the present patent application and the founder of Luigino's, Inc.

7. During my employment at Jenos, Inc., I worked extensively with Mr. Paulucci on a production method for making dough products and pizza crusts. Some of these are the methods and products disclosed in U.S. Patent No. 4,842,882 (the "882 patent"), which issued to Mr. Paulucci on June 27, 1989. I understand that the '882 patent is presently assigned to The Pillsbury Company as a result of their 1985 acquisition of Jenos, Inc.

8. From my work at Jenos, Inc. and with Mr. Jenio F. Paulucci, I am intimately familiar with the crust-making examples set forth in the '882 patent. I have therefore worked on both the laminated crust of the present invention and the crusts illustrated in the examples of the '882 patent. In particular, I am very familiar with "EXAMPLE 6" shown in column 10 of the '882 patent and the resulting dough and crust products associated therewith.

9. In general, as I had observed during numerous tests of the products, the dough crust products described in the '882 patent are "breadly" products that have a porous, open, rounded internal cellular structure. This is similar to the structure of a well-risen loaf of baked bread having a very airy interior.

10. Although Example 6 of the '882 patent states that the dough is "laminated" and that the finished crust is "laminated," the use of the term "laminated" in the example does not mean that the product described in Example 6 will produce layers of dough

separated by layers of fat. To the contrary, as I have noted above, the crust produced by Example 6 has a "bready" porous interior without significant layer separation.

11. One reason for this result is that the method of Example 6 utilizes shortening flakes that are distributed in the dough. Because the flakes are relatively dry, and formed of separated particles that do not adhere to each other, the flakes end up distributed throughout the dough when the processing is completed. Since the dough is stretched, the flakes separate from each other and distribute throughout the dough in a random fashion.

12. Thus, the shortening flakes in Example 6 are introduced between the sheets of dough, but the final crust product is not "laminated" as the term is used in the present application. In other words, the resulting finished crust from Example 6 of the '882 patent does not exhibit a uniform, multi-layered structure of fat separating multiple layers of dough. The "lamination" term as used in the '882 patent instead relates to the adhesion between the upper and lower surfaces of the cooked pizza crust and the mere introduction of the flaked shortening between layers.

13: When developing the crust of the presently claimed invention method, the goal was to obtain a pizza crust that had a crisp outside and a flaked multi-layered interior similar to the interior of a croissant. Most importantly, a crust was sought that would retain those properties and be structurally stable after being frozen and reheated in a microwave oven. The method of Example 6 of the '882 patent resulted in a completely different crust compared to the present invention, one that was not microwaveable nor flaky (in the sense of a croissant-type structure as opposed to a porous-type structure), and therefore a completely different approach was taken and a drastically different method was developed to produce a crust having these unique, unconventional qualities.

14. I have performed numerous noncontemporaneous tests on products resulting from both of these methods.

15. There are several major differences between the method of the present invention and the method described in Example 6 of the '882 patent. For example, the extrusion of a smooth margarine at the claimed point in the instant process produces

even, homogeneous layers of fat that result in the multi-layered, laminated structure in the finished crust. This produces a croissant-like interior structure and a crispy outer crust. Margarine is an emulsified fat in a viscous form, and thereby exhibits spreading qualities very different from shortening flakes. The even distribution of fat between the layers of dough in the multi-layer structure, in addition to the other claimed process steps, makes the dough microwaveable.

16. Furthermore, the step of proofing the dough *before* sheeting of the dough layers and the introduction of the smooth margarine also greatly affects the quality of the finished product. In the example of the '882 patent, the dough is proofed *after* the sheeting process.

17. If one compares a cut-away cross-section of the baked crust of the Example 6 of the '882 patent side-by-side with a section of the crust of the present invention, distinct and unexpected differences in the qualities between the two are readily apparent. The crust of the present invention is more compact, but has many more large-flaked layers. The structure of the crust of the present invention is uniform due to the multiple uniform layers, and include large, thin flakes similar to a croissant. The crust of the present invention is also significantly more stable due to this structure in that it is crisper and more uniform after microwaving. In contrast, the crust made in accordance with Example 6 of the '882 patent is much thicker and includes very large pores in the interior. The flakes of dough in the interior of the crust are much smaller and distributed throughout the interior in a very random fashion. Furthermore, large, round, open pores are present throughout. This is noted on line 34 of column 10 of the '882 patent, which notes that the internal structure comprises "open cells ranging in size from 1/8-inch to 1/4-inch." These are large cells that would be undesirable for use in a microwaveable dough because these cells would fill with steam during microwaving and cause the crust to become soggy, unstable, and tough in some areas.

18. Similarly, if one compares side-by-side the cutaway portions of the crust of Example 6 with the crust of the present invention after both crusts are frozen and then microwaved, it is apparent that the structure of the crust of the present invention remains surprisingly intact and exhibits similar qualities to the freshly baked crust. In

contrast, the crust of Example 6 of the '882 patent exhibits a non-uniform, cardboard-like or soggy structure with collapsed pores that is not ideally suited for holding heavy pizza topping and supporting it through a microwaving process.

19. A summary of the observations of my tests is illustrated in the following data table:

PROPERTY OF CRUST OBSERVED	CRUST MADE ACCORDING TO THE '882 PATENT	CRUST MADE ACCORDING TO THE PRESENT INVENTION
Interior pores 0.125 to 0.25 inches in diameter	+	-
Crispy outer crust	+	+
Non-round, uniform interior pores	-	+
Multiple, evenly distributed layers of fat and dough	-	+
Uniform general interior structure	-	+
Structure remains intact after freezing and microwaving	-	+
Presence of large flakes	-	+

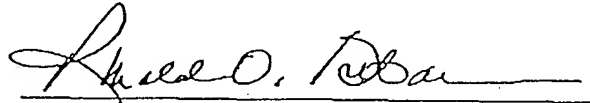
20. The resulting pizza crust exhibits the unique characteristics of being uniformly layered with fat and dough, thereby containing croissant-like large flakes between stable, crispy outer surfaces even after being frozen and microwaved. The dough retains this structure remarkably well even after baking, topping, freezing and reheating in a microwave oven. The crust of the Paulucci '882 patent does not exhibit the qualities of the present crust, including structural stability, large flaked layered structure and crisp upper and lower surfaces. The crust of the '882 patent also was not in our view a commercially desirable product after it was frozen and microwaved because it was too soggy, irregular and unstable.

21. When the present invention was developed with the intention to produce a crust having the improved qualities of structural stability, large flaked layered structure and crisp upper and lower surfaces, the degree of improvement in microwavability of the

resulting crust over the crust produced in the '882 patent was unexpected and surprising. In this regard, the method of the '882 patent did not suggest that the claimed process steps would produce a product having such improved microwavable properties. These properties are so improved over what has been done previously that Luigino's has used the resulting crust product in a number of commercially successful products other than pizzas.

22. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Dated: 9/30/99



Ronald O. Bubar



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of Ronald O. Bubar) Examiner: Tran Lien, T.
Serial No.: 09/535,067) Art Unit: 1761
Filed: March 23, 2000) Atty. Docket No. 45768.2001.3
For: LAMINATED PIZZA CRUST)

To: Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF (37 C.F.R § 1.192)

This is an appeal of the Examiner's final rejection of claims 12, 13, 16-23 and 25-28, issued on July 21, 2004. This brief is transmitted in triplicate.

REAL PARTY IN INTEREST.

This application has been assigned to Jeno F. Paulucci.

RELATED APPEALS AND INTERFERENCES.

There are no other appeals or interferences related to this appeal. Accordingly, this section is inapplicable.

STATUS OF CLAIMS.

Claims 12, 13, 16-23 and 25-28 are pending in the case and have been finally rejected. A

copy of the appealed claims is attached as a Claims Appendix. Claims 8-11 have been withdrawn from consideration, and claims 1-7, 14, and 24 have been cancelled without prejudice. Note that claim 15 is presently pending and not withdrawn, but has not been indicated allowable or rejected by the Examiner. However, claim 15 is included in the claims listed in the Claims Appendix.

STATUS OF AMENDMENTS.

Since the Examiner issued the final rejection, Applicant filed its Notice of Appeal on October 21, 2004, without further amendment.

SUMMARY OF CLAIMED SUBJECT MATTER.

The claimed subject matter includes a laminated crust suitable for use as a pizza crust. (See Specification page 3, line 5). Generally, consumers desire a pizza crust having crispy characteristics. (See Specification page 1, line 18). However, providing a crispy crust for pizza that is frozen and must be reheated, such as with microwave energy, has traditionally not been attainable. (See Specification page 1, line 18). The laminated crust of the claimed subject matter improves these qualities compared to the prior art. (See Specification page 3, line 5).

In the claims at issue, the crust comprises a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough. (See Claims Appendix, independent claims 12, 17, and 27). Independent claim twelve includes a laminated crust dough comprising a multi-layered dough lamination incorporating a plurality of margarine layers distributed between layers of a proofed dough product. The lamination may be formed by

forming the dough product into a sheet, extruding a margarine layer thereon, manipulating the sheet and margarine to produce a folded dough having a plurality of margarine layers distributed between layers of the dough product, and docking the folded dough to form a laminated crust dough having a plurality of puncture openings. (See Specification page 4, line 36 through page 5, line 7, and Figure 1, reference characters 12-15).

Independent claim seventeen includes a laminated crust dough pizza comprising a plurality of layers including margarine distributed between layers of dough. The plurality of layers of margarine distributed between layers of dough may be formed by proofing a dough sheet, extruding a margarine layer onto the dough sheet, folding the sheet over the margarine layer to form a fatted dough, stretching the fatted dough into a fatted sheet using a first stretching means including a series of rollers applied to the fatted dough, distributing the fatted sheet onto a conveyor using a first piling means to overlap the fatted sheet on the conveyor, and reforming the fatted sheet to a predetermined thickness. (See Specification page 4, line 36 through page 5, line 7, page 7, lines 3-14, Figure 1, reference characters 12-15, and Figure 3). The folding, stretching, distributing and reforming steps produce a folded dough having a plurality of margarine layers distributed between layers of dough. The folded dough may be docked to form a laminated crust dough and one or more pizza toppings may be applied to the laminated crust dough. (See Specification page 5, lines 4-7).

Independent claim twenty-seven includes a laminated crust comprising a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough. (See Specification page 4, line 36-page 5, line 2). The fatted dough may be docked and baked to produce the laminated crust. (See Specification page 5, lines 4-7).

The laminated crust of the claimed subject matter, as described above, has several important attributes. For example, the laminated crust of the invention increases the desirable flakiness and crispiness qualities of the crust. (See Specification, page 3, line 31). As another example, the laminated pizza crust of the invention is particularly well adapted to maintain its crispiness qualities when heated by microwave energy. (See Specification, page 3, line 31). Generally, the steps of proofing the dough before lamination, using margarine rather than shortening, baking rather than frying, and docking the product provide these desirable attributes.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL.

Whether the rejected claims are obvious under 35 U.S.C. §103(a) over U.S. Patent No. 4,623,542 to Wallin et al. (copy attached in the Evidence Appendix)?

ARGUMENT.

Whether claims 12, 13, 16-23 and 25-28 are obvious under §103(a) over Wallin et al.

As noted in the Final Office Action for the present case (copy attached in the Evidence Appendix), the Examiner has rejected claims 12, 13, 16-23, and 25-28 under 35 U.S.C. § 103(a) as being unpatentable over Wallin et al. (U.S. Patent No. 4,623,542). Specifically, Examiner states that Wallin et al. “disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flour, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked.” Examiner also stated that Wallin et al. “do not disclose using margarine, having pizza topping on the laminated crust and baking the laminated dough.”

The Examiner has taken official notice of several asserted facts to supply some of the claim limitations not disclosed by Wallin et al. First, the Examiner stated it would have been obvious to use margarine instead of shortening because it is well known in the art to use shortening, butter, or margarine alternatively. Further, the Examiner stated that butter and margarine are more expensive than shortening and give different taste and nutritional factors than shortening. Second, the Examiner stated that there is no identity standard to pizza because many types of toppings are used to form pizza, and that it would have been obvious to one skilled in the art to use a variety of filling to make different types of product. Finally, the Examiner stated that baking and frying are well known alternative cooking methods, wherein frying gives better texture but has the drawback of increasing the fat content, and that it would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content.

The Examiner bears the initial burden in establishing a prima facie case of obviousness when rejecting claims under 35 U.S.C. §103. In re Piasecki, 745 F.2d 1468, 223 USPQ 758 (Fed. Cir. 1985); In re Reuter, 651 F.2d 751, 210 USPQ 249 (CCPA 1981). If the Examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of non-obviousness.

To properly establish a prima facie case of obviousness, MPEP § 706.02(j) identifies three basic criteria that must be met. First, the prior art reference (or references when combined) must teach or suggest all of the claim limitations. Although official notice may be taken of facts outside of the record which are capable of instant and unquestionable demonstration as being “well known” in the art, applicants are allowed to traverse such notice and require the examiner to cite references or produce affidavits in support of the position taken. MPEP § 2144.03.

Second, there must be some suggestion or motivation in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or combine reference teachings. Finally, there must be a reasonable expectation of success. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Applicant respectfully traverses Examiner's assertion of obviousness and official notice that margarine, butter, and shortening are interchangeable. Using a dairy substitute such as margarine, or a dairy product such as butter, provides advantages over shortening in terms of taste and texture for a crispy crust suitable for microwave heating. This was at least partially suggested and acknowledged by the Examiner in the Office action when she stated that butter and margarine give different taste and nutritional factors than shortening. Further, the prior art cited by Examiner itself confirms this lack of interchangeability. Wallin et al. state that the roll-in shortening "may be any of the conventional hydrogenated vegetable oil shortenings available on the market," and do not suggest utilizing anything other than vegetable oil based shortening as their fattening agent. See Evidence Appendix, Wallin et al. patent, col. 10, lines 16-20. A primary objective of Wallin et al. is to provide a toaster pastry product which has a "flaky exterior surface and a bready interior." See Evidence Appendix, Wallin et al. patent, col. 2, lines 20-25, and col. 11, lines 8-9.

It is believed that the use of shortening contributes to such bready interior. For example, U.S. Patent No. 4,842,882 to Paulucci (of record and copy attached in the Evidence Appendix) uses shortening as the fattening agent when a porous, bready quality is desired. It is also noted that the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, (copy attached in the Evidence Appendix) discusses the advantages of utilizing margarine rather than shortening flakes to avoid producing a bready interior. See Evidence Appendix, Bubar

Declaration, paragraphs 10-11. Although the Examiner is correct that this declaration compares the claimed invention to Paulucci rather than Wallin, the declaration is relevant because Paulucci is similar to Wallin in this aspect. Therefore, the interchangeability of margarine like products and shortening is not a fact which is capable of instant and unquestionable demonstration as being “well known” in the art and, hence, all of the elements of the claimed invention have not been shown. Further, the use of margarine over shortening provides unexpected benefits in terms of the crispiness of the crust. Therefore, a prima facie case of obviousness has not been established.

In addition, the Examiner has indicated that there is no identity standard to pizza, and that any toppings may be applied to a crust to form a pizza, such as a dessert pizza having toppings such as fruit and cream. Applicant respectfully disagrees. One skilled in the art would recognize that pizza does have an identity standard regarding toppings. For example, *Webster's New Universal Unabridged Dictionary*, Barnes & Noble Books (1992) defines pizza as “a flat, open-faced pie of Italian origin, consisting of a crust topped with tomato sauce and cheese, often garnished with anchovies, sausage slices, mushrooms, bacon, olives, etc.” Although there may be references alluding to a “dessert pizza” having fruit and cream as a topping, the term “pizza” is being used facetiously to indicate that the dessert is generally shaped like a pizza, not that the dessert is an actual pizza.

Applicant also respectfully traverses Examiner's assertion of obviousness and official notice that baking and frying are well known alternative cooking methods, thereby suggesting that baking and frying are interchangeable. Frying the crust allows the exterior surface in contact with the oil to become dry and flaky, while leaving the interior bready. Wallin et al. desire a pastry crust that has a flaky exterior surface and a bready interior, and therefore fry their toaster

pastry. See Evidence Appendix, Wallin et al. patent, col. 2, lines 20-25 and col. 12, line 26. In contrast, the crust of the present invention has a crispy, non-bready quality throughout its interior. Baking the dough instead of frying the dough contributes to this crispy structure and helps to provide a crust suitable for use in a microwavable pizza. Therefore, although the determination of patentability in product by process claims is based on the product itself, baking the dough gives distinct and unexpected structural advantages over the prior art in terms of reducing bready qualities of the crust.

Further, the choice of whether to fry or bake depends on many factors besides the healthfulness of the food. Although increased fat content may indeed make a crust less healthy, it also changes important characteristics of the crust, such as its texture and feel. The frying step employed in Wallin et al. increases its total fat content by about 7% of the total weight of the cooked dough. See Evidence Appendix, Wallin et al. patent, col. 10, lines 4-15. An increase of this magnitude will impart a greasy feel to the crust. Such a greasy feel may be acceptable, or even desired, in a filled pastry product. However, such a greasy feel is not desirable in baked laminated dough suitable for use as a pizza crust. Hence, because the interchangeability of frying and baking is not a fact which is capable of instant and unquestionable demonstration as being “well known” in the art, all of the elements of the claimed invention have not been shown. In fact, frying and baking have been shown to provide and produce patently distinct characteristics in previously patented inventions (e.g. see U.S. Patent No. 4,170,659 to Totino et al.). Further, baking the dough provides distinct and unexpected advantages over frying the dough in producing a crispy crust. Therefore, a prima facie case of obviousness has not been established.

Further, the Examiner has not demonstrated other elements of the claimed invention,

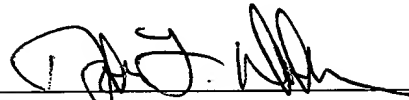
either within the prior art or by taking official notice. Each currently pending independent claim calls for margarine layers to be distributed between layers of a proofed dough product. See Claims Appendix, claims 12, 17, and 27. Wallin et al. proof the dough after the shortening lamination step. See Evidence Appendix, Wallin et al. patent, col. 11 starting at line 64 (discussing proofing after lamination and before frying). It is believed that proofing of the dough before lamination reduces volume expansion of the dough after lamination, thereby reducing bready qualities and increasing crispiness qualities of the dough. Therefore, although the determination of patentability in product by process claims is based on the product itself, proofing the dough before lamination gives distinct and unexpected structural advantages over the prior art. Further, as stated in the Ronald O. Bubar Declaration filed pursuant to 37 C.F.R. §1.132 on May 8, 2001, “the step of proofing the dough *before* sheeting of the dough layers and the introduction of the smooth margarine also greatly affects the quality of the finished product.” See Evidence Appendix, Bubar declaration, paragraph 16 (emphasis in original). Again, although the Examiner is correct that this declaration compares the claimed invention to Paulucci and not to Wallin, the declaration is on point because Paulucci is similar to Wallin in this aspect. Hence, Examiner has not shown all of the claim limitations of the invention, either by prior art or by official notice, and has therefore not produced a prima facie case of obviousness.

Taken together, either alone or in combination, proofing the dough before lamination, utilizing margarine type products over shortening, baking the dough rather than frying, and docking provide distinct and unexpected benefits over the prior art and official notices taken by the Examiner. Specifically, these factors contribute to providing a crust that is crispy throughout its interior, rather than bready. Such a crust is suitable for use as a pizza crust, and is particularly suitable for use as a crust in a microwavable pizza.

Reversal of the rejection of claims 12, 13, 16-23 and 25-28 is believed warranted and is solicited.

Respectfully submitted,

Dated: July 12, 2005



John F. Dolan
Reg. No. 45,382
Customer No. 22859
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7000

#3143196\1

CLAIMS APPENDIX

12. A laminated crust dough comprising:
a multi-layered dough lamination incorporating a plurality of margarine layers distributed between layers of a proofed dough product, said lamination formed by forming the dough product into a sheet, extruding a margarine layer thereon, manipulating the sheet and margarine to produce a folded dough having a plurality of margarine layers distributed between layers of the dough product, and docking said folded dough to form a laminated crust dough having a plurality of puncture openings.
13. The laminated crust dough of claim 12 wherein said sheet and margarine are manipulated by folding said sheet over said margarine layer to form a fatted dough, stretching said fatted dough into a fatted sheet using a first stretching means including a series of rollers applied to said fatted dough, distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor, and reforming said fatted sheet to a predetermined thickness.
15. The laminated crust dough of claim 12 wherein said crust is formed into pizza shapes and baked in an oven.
16. The laminated crust dough of claim 12 wherein said dough product further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.
17. A laminated crust dough pizza comprising
a plurality of layers including, margarine distributed between layers of dough formed by proofing a dough sheet;

extruding a margarine layer onto said dough sheet;
folding said sheet over said margarine layer to form a fatted dough;
stretching said fatted dough into a fatted sheet using a first stretching means, said first stretching means including a series of rollers applied to said fatted dough;
distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor;
reforming said fatted sheet to a predetermined thickness, wherein said folding, stretching, distributing and reforming steps produce a folded dough having a plurality of margarine layers distributed between layers of dough;
docking said folded dough to form a laminated crust dough; and
applying one or more pizza toppings to said laminated crust dough.

18. The crust dough pizza of claim 17 wherein the steps of reforming said fatted sheet to a predetermined thickness further comprises:

stretching said fatted sheet using a second stretching means, said second stretching means including a series of rollers;
distributing said fatted sheet onto a conveyor using a second piling means to overlap said fatted sheet on said conveyor; and
rolling said fatted sheet to a predetermined thickness using a plurality of second rolling means.

19. The crust dough pizza of claim 17 wherein said first stretching means further comprises a series of rollers that are mounted for rotation over a conveyor.

20. The crust dough pizza of claim 17 wherein said dough layers further comprise approximately 60 percent flour, 1.25 percent margarine and 32 percent water.

21. The laminated crust dough of claim 12 wherein the margarine of said margarine layers is equal to 10% of the total weight of the dough.
22. The crust dough pizza of claim 17 wherein said margarine is equal to 10% of the total weight of the dough.
23. The crust dough pizza of claim 17 further including the step of baking said laminated crust dough before applying said pizza toppings.
25. The laminated crust of claim 27 wherein the margarine of said margarine layers is equal to 10% of the total weight of the dough.
26. The laminated crust of claim 27 wherein said dough layers further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.
27. A laminated crust comprising a plurality of layers including margarine distributed between layers of proofed dough to form a fatted dough, said fatted dough is docked and baked to produce the laminated crust.
28. The laminated crust of claim 27 wherein taste and texture of the laminated crust does not significantly degrade upon microwaving or freezing.

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

PATENT NO. : 4,623,542
DATED : November 18, 1986
INVENTOR(S) : Glenn Wallin, et al.

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

Cover page at [63] insert ", now U.S. Patent 4,612,198
issued September 16, 1986" after "1982".

Claim 11, line 12 "2.5%" should be "3.5%".

Claim 11, line 13 "0.1%" should be "0.15%".

Signed and Sealed this
Twelfth Day of January, 1988

Attest:

DONALD J. QUIGG

Attesting Officer

Commissioner of Patents and Trademarks



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/535,067	03/23/2000	Ronald O. Bubar	4645/31	1606

22859 7590 07/21/2004

INTELLECTUAL PROPERTY GROUP
FREDRIKSON & BYRON, P.A.
200 SOUTH SIXTH STREET
SUITE 4000
MINNEAPOLIS, MN 55402

EXAMINER

TRAN LIEN, THUY

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 07/21/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Response due: 10.21.04 Final O.A.

Docketed 7.26.04 atg

RECEIVED

JUL 26 2004

INTELLECTUAL PROPERTY DEPARTMENT

Office Action Summary	Application No.		Applicant(s)	
	09/535,067		BUBAR, RONALD O.	
	Examiner		Art Unit	
	Lien T Tran		1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 April 2004.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 12,13,16-23 and 25-28 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 12,13,16-23 and 25-28 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1761

Claims 12-13, 16, 17-23 and 25-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wallin et al (4623542).

Wallin et al disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flour, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked. (see col. 7 lines 22-48, col. 11 lines 26-30 and 64-68, col. 10 lines 1-2)

Wallin et al do not disclose using margarine, having pizza topping on the laminated crust and baking the laminated dough.

It would have been obvious to one skilled in the art to use margarine instead of shortening because it is well known in the art to use shortening, butter or margarine alternatively. Butter and margarine are more expensive than shortening and give different taste and nutritional factor from shortening. It would have been obvious to one skilled in the art to select butter, margarine or shortening taking into consideration the above factors. As to applying pizza topping or forming a pizza, there is no identity standard to pizza because many types of topping are used to form pizza. For example, there are dessert pizza having fruit and cream. It would have been obvious to one skilled in the art to use a variety of filling to make different types of product. For example, it would have been obvious to use tomato and cheese filling if one wants to make a breakfast pizza. Such concept is well known in the art; for instance, there is breakfast burrito, breakfast taco etc.. There is also pizza pocket which has the same structure as the one disclosed by Wallin et al. While Wallin et al teach to fry the

Art Unit: 1761

product, baking and frying are well known alternative cooking methods. Frying gives a better texture but has the drawn back of increasing the fat content. It would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content. This alternative is known in the art; for example, there are potato chips that are fried and there are reduced-fat potato chip that are baked. The Wallin et al product also differs from the claimed product in the way it is made. However, determination of patentability in product-by-process claims is based on the product itself.

In the response filed 4/23/2004, applicant argues Wallin et al proof the dough after the shortening lamination step; applicant states proofing the dough before lamination gives distinct and unexpected structural advantage over the prior art. This argument is not persuasive. Whether the dough is proofed before lamination or after lamination, the final product comprises proofed dough layers. Applicant's claims are directed at the product, not the process of making it. Applicant argues, proofing before lamination gives unexpected result; however, applicant does not have any showing of the claimed product over the Wallin et al product. The declaration applicant makes reference to is not a comparison between the claimed product and the Wallin et al product. Applicant further argues the margarine, butter and shortening can not be used interchangeably and Wallin et al do not suggest using anything other than vegetable oil based shortening. The examiner respectfully disagrees with applicant. It is well known in baking to use shortening, butter and margarine interchangeably. The decision to use any of the well known fats is based on several factors. Butter and margarine give better

Art Unit: 1761

taste and flavor but they are more expensive than shortening and are not as stable. Shortening is cheaper and provides more shelf stability. Thus, the decision to use any of the well known fats would have been an obvious matter of reference depending on which factor one deems more important. As evidence that it is well known to substitute shortening with margarine or butter or vice versa, the examiner will submit papers which teach such substitution. For example, the Kitchen Tips teach to substitute shortening with margarine. The Crisco products teach that shortening can be substituted for butter or margarine. If shortening can be substituted for margarine or butter, it is obvious margarine can be used in place of shortening. While the Crisco paper does not have a date, the product has been around for a long time. The question of using shortening or butter or margarine is the one based on taste, texture and flavor versus expense and stability. The choice to be made is based on which factor is deemed more important. Applicant further argues that baking and frying as known cooking alternatives does not hold true for mass production food processors or recipe formulators. The basis of this argument is not clear. What mass production or recipe formulators does applicant refer to. Applicant argues baking gives unexpected result in terms of reducing breadiness of the crust. This argument is not supported by factual evidence and there is no limitation with respect to texture in the claims. Applicant further argues the choice of frying or baking depends on many factors besides the healthfulness of the food. What applicant says is true, but it does not take away the fact that such alternative is well known and would have been obvious to one skilled in the art. Some foods taste better when they are fried, but that does not mean that they

Art Unit: 1761

can not be baked. Thus, the choice between baking and frying is one that is based on taste, flavor, texture versus the fat content, calorie content and healthfulness.

Applicant's arguments filed 4/23/04 have been fully considered but they are not persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Tuesday, Wednesday and Friday.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 1761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

July 11, 2004

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/535,067	03/23/2000	Ronald O. Bubar	4645/31	1606

22859 7590 07/21/2004

INTELLECTUAL PROPERTY GROUP
FREDRIKSON & BYRON, P.A.
200 SOUTH SIXTH STREET
SUITE 4000
MINNEAPOLIS, MN 55402

EXAMINER

TRAN LIEN, THUY

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 07/21/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Response due: 10.21.04 Final O.A.

Docketed 7.26.04 atg

RECEIVED

JUL 26 2004

INTELLECTUAL PROPERTY DEPARTMENT

Office Action Summary	Application No.	Applicant(s)	
	09/535,067	BUBAR, RONALD O.	
	Examiner	Art Unit	
	Lien T Tran	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 April 2004.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 12,13,16-23 and 25-28 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 12,13,16-23 and 25-28 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1761

Claims 12-13, 16, 17-23 and 25-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wallin et al (4623542).

Wallin et al disclose a laminated crust comprising alternating substantially discrete layers of proofed dough and roll-in shortening. The dough comprises about 45-60% by weight flour, about 30-45% by weight water, .5-10% shortening and about 4-20% roll-in shortening. The laminated dough is docked. (see col. 7 lines 22-48, col. 11 lines 26-30 and 64-68, col. 10 lines 1-2)

Wallin et al do not disclose using margarine, having pizza topping on the laminated crust and baking the laminated dough.

It would have been obvious to one skilled in the art to use margarine instead of shortening because it is well known in the art to use shortening, butter or margarine alternatively. Butter and margarine are more expensive than shortening and give different taste and nutritional factor from shortening. It would have been obvious to one skilled in the art to select butter, margarine or shortening taking into consideration the above factors. As to applying pizza topping or forming a pizza, there is no identity standard to pizza because many types of topping are used to form pizza. For example, there are dessert pizza having fruit and cream. It would have been obvious to one skilled in the art to use a variety of filling to make different types of product. For example, it would have been obvious to use tomato and cheese filling if one wants to make a breakfast pizza. Such concept is well known in the art; for instance, there is breakfast burrito, breakfast taco etc.. There is also pizza pocket which has the same structure as the one disclosed by Wallin et al. While Wallin et al teach to fry the

Art Unit: 1761

product, baking and frying are well known alternative cooking methods. Frying gives a better texture but has the drawn back of increasing the fat content. It would have been obvious to one skilled in the art to bake the product if one wants a healthier product having lower fat content. This alternative is known in the art; for example, there are potato chips that are fried and there are reduced-fat potato chip that are baked. The Wallin et al product also differs from the claimed product in the way it is made. However, determination of patentability in product-by-process claims is based on the product itself.

In the response filed 4/23/2004, applicant argues Wallin et al proof the dough after the shortening lamination step; applicant states proofing the dough before lamination gives distinct and unexpected structural advantage over the prior art. This argument is not persuasive. Whether the dough is proofed before lamination or after lamination, the final product comprises proofed dough layers. Applicant's claims are directed at the product, not the process of making it. Applicant argues, proofing before lamination gives unexpected result; however, applicant does not have any showing of the claimed product over the Wallin et al product. The declaration applicant makes reference to is not a comparison between the claimed product and the Wallin et al product. Applicant further argues the margarine, butter and shortening can not be used interchangeably and Wallin et al do not suggest using anything other than vegetable oil based shortening. The examiner respectfully disagrees with applicant. It is well known in baking to use shortening, butter and margarine interchangeably. The decision to use any of the well known fats is based on several factors. Butter and margarine give better

Art Unit: 1761

taste and flavor but they are more expensive than shortening and are not as stable.

Shortening is cheaper and provides more shelf stability. Thus, the decision to use any of the well known fats would have been an obvious matter of reference depending on which factor one deems more important. As evidence that it is well known to substitute shortening with margarine or butter or vice versa, the examiner will submit papers which teach such substitution. For example, the Kitchen Tips teach to substitute shortening with margarine. The Crisco products teach that shortening can be substituted for butter or margarine. If shortening can be substituted for margarine or butter, it is

obvious margarine can be used in place of shortening. While the Crisco paper does not have a date, the product has been around for a long time. The question of using shortening or butter or margarine is the one based on taste, texture and flavor versus expense and stability. The choice to be made is based on which factor is deemed more important. Applicant further argues that baking and frying as known cooking alternatives does not hold true for mass production food processors or recipe formulators. The basis of this argument is not clear. What mass production or recipe formulators does applicant refer to. Applicant argues baking gives unexpected result in terms of reducing breadiness of the crust. This argument is not supported by factual evidence and there is no limitation with respect to texture in the claims.

Applicant further argues the choice of frying or baking depends on many factors besides the healthfulness of the food. What applicant says is true, but it does not take away the fact that such alternative is well known and would have been obvious to one skilled in the art. Some foods taste better when they are fried, but that does not mean that they

Art Unit: 1761

can not be baked. Thus, the choice between baking and frying is one that is based on taste, flavor, texture versus the fat content, calorie content and healthfulness.

Applicant's arguments filed 4/23/04 have been fully considered but they are not persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Tuesday, Wednesday and Friday.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 1761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

July 11, 2004

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700

**This Page is Inserted by IFW Indexing and Scanning
Operations and is not part of the Official Record**

BEST AVAILABLE IMAGES

Defective images within this document are accurate representations of the original documents submitted by the applicant.

Defects in the images include but are not limited to the items checked:

- ☐ **BLACK BORDERS**
- ☐ **IMAGE CUT OFF AT TOP, BOTTOM OR SIDES**
- ☐ **FADED TEXT OR DRAWING**
- ☐ **BLURRED OR ILLEGIBLE TEXT OR DRAWING**
- ☐ **SKEWED/SLANTED IMAGES**
- ☐ **COLOR OR BLACK AND WHITE PHOTOGRAPHS**
- ☐ **GRAY SCALE DOCUMENTS**
- ☒ **LINES OR MARKS ON ORIGINAL DOCUMENT**
- ☐ **REFERENCE(S) OR EXHIBIT(S) SUBMITTED ARE POOR QUALITY**
- ☐ **OTHER:** _____

IMAGES ARE BEST AVAILABLE COPY.

As rescanning these documents will not correct the image problems checked, please do not report these problems to the IFW Image Problem Mailbox.